U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED C. SMITH and ARCHITECT OF THE CAPITOL, Washington, DC

Docket No. 02-219; Submitted on the Record;
Issued April 11, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings fairly and reasonably represented his of wage-earning capacity; (2) whether appellant met his burden of proof to modify the wage-earning capacity determination; (3) whether the Office properly determined that appellant received an overpayment in compensation in the amount of $26,074.53 for the period April 21, 1998 to July 17, 1999; (4) whether the Office abused its discretion by denying waiver of the overpayment; and (5) whether the Office properly required repayment of the overpayment by withholding $100.00 every four weeks from his continuing compensation.

On May 7, 1984 appellant, then a 28-year-old temporary painter, sustained an employment-related herniated disc when he picked up a five-gallon can of paint. He stopped work on May 8, 1984 and received appropriate continuation of pay and compensation thereafter. In May 1984 he underwent two surgical procedures and had a consequential right foot drop that was accepted as employment related. On April 21, 1998 appellant began full-time private employment as a painter with Crown, Incorporated.[1] By decision dated July 14, 1999, the Office determined that appellant had been reemployed on April 21, 1998 as a painter with Crown, Incorporated at a wage of $460.00 per week. The Office found that this position fairly and reasonably represented his wage-earning capacity. The Office applied the *Shadrick* formula[2] and noted that appellant's current weekly pay rate for the date-of-injury position was $764.00 and noted that his adjusted weekly earnings were $366.72. The Office then determined that his loss of wage-earning capacity was $397.28 and adjusted his compensation accordingly, to begin July 18, 1999.

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[1] The record also indicates that appellant had earnings of $5,355.00 from self-employment in 1996.

[2] *See Albert C. Shadrick*, 5 ECAB 376 (1953).

On August 5, 1999 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of $26,074.53, which arose because he continued to receive wage-loss compensation after he returned to work on April 21, 1998. The Office found that appellant was at fault in the creation of the overpayment. On September 3, 1999 appellant requested a hearing regarding the preliminary overpayment determination.

By decision dated April 5, 2000, an Office hearing representative remanded the case to the Office. The hearing representative found that the evidence of record indicated that there was "a distinct possibility that the claimant is capable at this time of returning to his date[-]of[-]injury employment," which would indicate that his compensation should be terminated and not just reduced. On remand the Office was to obtain job descriptions from the employing establishment and his current employer and refer appellant to a Board-certified orthopedic surgeon for a second-opinion evaluation. The July 14, 1999 wage-earning capacity decision was to remain in place until a *de novo* decision was issued and the hearing regarding the overpayment in compensation was postponed until a later date.

On April 19, 2000 appellant left employment with Crown, Incorporated and began working with Certa-Pro Painters.

Following remand, the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record to Dr. Frank G. Nisenfeld, a Board-certified orthopedic surgeon. In a decision dated September 13, 2000, the Office found that the July 14, 1999 loss of wage-earning capacity decision would stay because the medical evidence of record, including Dr. Nisenfeld's August 31, 2000 report, indicated that appellant could not return to his date-of-injury employment and thus it would be improper to terminate his wage-loss compensation. The case was forwarded to the Branch of Hearings and Review to conduct a hearing regarding the July 14, 1999 wage-earning capacity decision and the August 5, 1999 preliminary overpayment decision.

By letter dated September 22, 2000, appellant, through his attorney, requested that full benefits be restored.

On January 18, 2001 a hearing was held, at which time appellant testified regarding his work activities with private employers since 1998. He stated that he stopped work on September 3, 2000 because his condition was deteriorating and that repaying the overpayment would create a financial hardship. He also submitted financial information and medical evidence from his treating Board-certified family practitioner, Dr. K. Jill Ciccarelli.

By decision dated May 21, 2001, an Office hearing representative affirmed the July 14, 1999 loss of wage-earning capacity decision. The hearing representative also finalized the August 5, 1999 preliminary overpayment decision, finding that appellant received an overpayment of compensation in the amount of $26,074.53 for the period April 21, 1998 through July 17, 1999, because he was working full time while receiving compensation. The hearing representative further found that appellant was at fault in the creation of the overpayment and, therefore, was not entitled to waiver and that $100.00 would be withheld each payment period from his continuing compensation to repay the overpayment. Finally, the hearing representative

compromised the debt principal to reflect a new balance of $16,045.99. The instant appeal follows.

The Board finds that the Office properly computed appellant's wage-earning capacity on July 14, 1999.

It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[3] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Federal Employees' Compensation Act[4] provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[5] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6] After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Albert C. Shadrick*[7] decision will result in the percentage of the employee's wage-earning capacity.[8] This has been codified by regulation at 20 C.F.R. § 10.403. Section 10.403(d) provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[9] Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.[10]

In the instant case, appellant began working at Crown, Incorporated on April 21, 1998 and, therefore, had been working the requisite 60 days when the Office determined his wage-earning capacity on July 14, 1999. In determining the wage-earning capacity based on actual earnings, as developed in the *Shadrick* decision, the Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing actual earnings by current

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[3] *See Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[6] *Hubert F. Myatt*, 32 ECAB 1994 (1981).

[7] *Albert C. Shadrick, supra* note 2.

[8] *See Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick, supra* note 2.

[9] 20 C.F.R. § 10.403(d) (1999); *see Afegalai L. Boone*, 53 ECAB ____ (Docket No. 01-2224, issued May 15, 2002).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993); *see William D. Emory*, 47 ECAB 365 (1996).

date-of-injury pay rate. In the instant case, the Board finds that the Office properly used appellant's actual earnings of $460.00 per week and a current pay rate for his date-of-injury job of $957.20 per week to determine that he had a 48 percent wage-earning capacity. The Office then multiplied the pay rate at the time of the injury, $764.00, by the 48 percent wage-earning capacity percentage. The resulting figure of $366.72 was then subtracted from appellant's date-of-injury pay rate of $764.00, which provided a loss of wage-earning capacity of $397.28. The Office then multiplied this amount by the appropriate compensation rate of 66-2/3 percent, to yield $297.96. The applicable cost-of-living adjustments were then added to reach the final compensation figure of $441.00 per week, or $1,764.00 every four weeks. The Board, therefore, finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent his wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

The Board, however, finds that this case is not in posture for decision regarding modification of the wage-earning capacity determination.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[11]

In the instant case, at the January 18, 2001 hearing, appellant testified that he had stopped work on September 3, 2000 because his condition had deteriorated. The medical evidence relevant to a modification of appellant's wage-earning capacity includes an August 31, 2000 report, in which Dr. Nisenfeld, a Board-certified orthopedic surgeon, who performed a second-opinion evaluation for the Office, noted findings on examination of peroneal palsy on the right with a dropped foot. Straight leg raising was positive on the right at 30 degrees and at 45 degrees on the left. The physician diagnosed chronic failed back surgery and concluded that appellant could not return to his former job of painter, based on the job description found in the statement of accepted facts because he was physically incapable of lifting 40-pound buckets of paint or lifting and maneuvering spray equipment due to the failed back surgery.

Appellant's treating physician, Dr. Ciccarelli, a Board-certified family practitioner, provided treatment notes dated September 5, 2000 and January 26 and February 15, 2001, in which she advised that appellant was limited due to chronic back pain and right foot drop.

The Board finds that the above medical reports constitute sufficient evidence in support of appellant's claim. While these reports lack detailed medical rationale sufficient to discharge appellant's burden of proof to establish by the weight of reliable, substantial and probative evidence that his wage-earning capacity determination should be modified, this does not mean that these reports may be completely disregarded by the Office. It merely means that their probative value is diminished.[12] Thus, the above medical evidence is sufficient to require further development of the record to determine as to whether there was a material change in appellant's

[11] *Sue A. Sedgwick*, 45 ECAB 211 (1993); *Ronald M. Yokota*, 33 ECAB 1629 (1982).

[12] *See Delores C. Ellyett*, 41 ECAB 992 (1990).

employment-related condition.[13] It is well established that proceedings under the Act are not adversarial in nature,[14] and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[15] On remand the Office should prepare an updated statement of accepted facts and refer appellant, together with the complete case record and questions to be answered, to a Board-certified specialist for a detailed opinion with respect to modification of the wage-earning capacity determination. After such development as the Office deems necessary, a *de novo* decision shall be issued.

The Board further finds that an overpayment in compensation in the amount of $26,074.53 was created because appellant continued to receive wage-loss compensation after he returned to work on April 21, 1998.

The record in this case shows that the Office paid appellant compensation totaling $54,299.53 for the period April 21, 1998 to July 17, 1999. Benefits are available only while the effects of the work-related condition prevent an employee from earning the wages earned before the work-related injury.[16] In this case, appellant began work at Crown, Incorporated on April 21, 1998. The Board finds that the Office properly determined the amount of the overpayment by calculating that, under the *Shadrick* formula, for the period April 21, 1998 to July 17, 1999, appellant should have been paid $28,225.00. The Office then subtracted that amount from the $54,299.53 in benefits that appellant had received for that period, finding that an overpayment in compensation in the amount of $26,074.53 had been created.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment in compensation and, therefore, the overpayment is not subject to waiver.

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."[17]

Section 10.433(a) of the Office's regulations provides:

> "[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting

[13] *See Sue A. Sedgwick, supra* note 11.

[14] *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

[15] *See Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[16] 20 C.F.R. § 10.500(a) (1999).

[17] 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

> events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)."[18]

In this case, the Office found that appellant was at fault in creating the overpayment because he failed to report his employment with Crown, Incorporated on Office CA-1032 forms. The Office has the burden of proof in establishing that appellant was at fault in helping to create the overpayment.[19] In determining whether a claimant is at fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition.[20] Factors to be weighed are the individual's understanding of reporting requirements and the obligation to return payments, which were not due, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported and ability, efforts and opportunities to comply with reporting requirements.[21] Thus, an individual will be found to be at fault in the creation of an overpayment if the evidence shows either a lack of good faith or a failure to exercise a high degree of care in reporting changes in circumstances, which may affect entitlement to, or the amount of, benefits.[22] The Board has found that, even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment, which he or she knew or should have expected to know he or she was not entitled.[23]

In the instant case, the Board finds that appellant should have been aware that he was not entitled to continue to receive compensation after returning to work. The record includes an Office CA-1032 form, signed by appellant on July 1, 1998, in which he answered "no" to specific form questions regarding work history. The Board, therefore, finds that appellant was at fault in creating an overpayment in compensation where his omission of earnings constituted both the knowing and making of an incorrect statement as to a material fact and a knowing failure to furnish information.[24]

Lastly, the Board finds that the Office properly required repayment by withholding $100.00 each payment period from appellant's continuing compensation.

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[18] 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB ____ (Docket No. 00-607, issued January 23, 2001); *see also* 20 C.F.R. § 10.430.

[19] *Danny L. Paul*, 46 ECAB 282 (1994).

[20] *Stephen A. Hund*, 47 ECAB 432 (1996).

[21] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[22] *Id.*

[23] *See Russell E. Wageneck*, 46 ECAB 653 (1995).

[24] *James D. O'Neal*, 48 ECAB 255 (1996).

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.[25] Section 10.441(a) of Office regulations provides:

> "When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."[26]

In the instant case, the Office hearing representative found that, as appellant's income exceeded his expenses by $300.12 each month, a monthly repayment of $100.00 was reasonable. The Board finds that the Office gave due regard to appellant's financial circumstances in determining that appellant could repay the overpayment in compensation at a rate of $100.00 per month. The Office thus, did not abuse its discretion under the standard noted above.

Finally, the Board finds that the Office did not abuse its discretion in compromising the principal amount of the overpayment to $16,045.99. Under Office procedures, compromise of the principal of the overpayment can be considered if application of the interest charges would extend the period of repayment by more than 35 percent. Such a determination is made at the time the repayment schedule is established.[27] Office procedures provide, in relevant part:

> "If charges cannot be waived and a repayment schedule (either initial or renegotiated) is being established and the [Office] has determined, by review of detailed financial information, the maximum amount per installment that the debtor can afford and the period required for repayment of the debt at this rate is extended by more than 35 [percent] due to the application of the charges, then the amount of the principal must be compromised so that the period required for repayment of the debt is not extended by more than 35 [percent]."[28]

The Board finds that, in a proper exercise of her discretion in this case, the Office hearing representative followed Office procedures and compromised the amount of the overpayment in compensation from $24,074.53 to $16,045.99.

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[25] *Howard R. Nahikian*, 53 ECAB ____ (Docket No. 01-138, issued March 4, 2002).

[26] 20 C.F.R. § 10.441(a) (1999).

[27] *See Jorge O. Diaz*, 53 ECAB ____ (Docket No. 00-1368, issued March 4, 2002).

[28] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.5 (September 1994).

The September 13, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed. The decision dated May 21, 2001 is affirmed in part and vacated in part and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
April 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member